No.

JAN 19 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD H. GONSALVES, Petitioner,

vs.

CATERPILLAR TRACTOR CO., Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq., as originally enacted, and as it stood in 1977, permitted an employer discretion to involuntarily retire an employee before the mandatory age specified in a long-standing bona fide pension agreement predating the ADEA, where the express terms allowed the employer discretion to invoke involuntary retirement.

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CATERPILLAR TRACTOR CO. ("CATERPILLAR") submits this brief in opposition to the Petition for a Writ of Certiorari filed by Donald H. Gonsalves ("Gonsalves"), Petitioner herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit which is reprinted as pages 1b through 8b of Appendix B to the Petition is reported at 24 FEP Cases 687 (7th Cir., 1980). The Opinion of the United States District Court for the Central District of Illinois which is reprinted as pages 1a through 5a of Appendix A to the Petition is reported at 22 FEP Cases 967 (C.D. Ill., 1980). The opinions are not as yet reported in West Publishing Co.'s System.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. V).

STATUTE INVOLVED

Only Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 is at issue in this appeal. That provision is set forth in the Petition (Pet. vi).

STATEMENT OF THE CASE

Effective June 1, 1977, Petitioner Donald H. Gonsalves ("Gonsalves") terminated his employment as a manager at one of Respondent's facilities. At the time of his retirement, Gonsalves was 59 years of age and had worked for Caterpillar for some forty years. Caterpillar's pension plan provided, *inter alia,* for involuntary retirement after the age of fifty if an employee had 10 years credited service or after thirty years credited service regardless of age. Almost two years after the severence of his employment, Gonsalves filed the Complaint, the outcome of which is the subject of the instant Petition. Gonsalves alleged in Count I of his two Count Complaint that Caterpillar violated the provisions of the Age Discrimination in Employment Act of 1967 (ADEA) with respect to the termination of Gonsalves' employment. Caterpillar answered the Complaint and set up eleven affirmative defenses. Thereafter, Caterpillar moved the District Court to enter an Order granting Caterpillar Summary Judgment on the basis that, for the purposes of that Motion only, Caterpillar could not have violated ADEA even if it had involuntarily retired Gonsalves solely on the basis of his age since, in 1977, Section 4(f)(2) of ADEA expressly permitted such action by an employer under the circumstances applicable to Gonsalves' separation—even were it called an involuntary retirement. Plaintiff argued that Section 4(f)(2) authorized involuntary retirement only in cases where the plan expressly required retirement under specific factual circumstances. Thus, Gonsalves asserted that when a Plan only permitted an employer to involuntarily retire an employee, but under those circumstances did not require such action, such a non-mandatory retirement fell outside the 4(f)(2) exemption and was therefore proscribed by the Act. In the Trial Court, Gonsalves also argued that the 1978 ADEA

amendments which, *inter alia* included the revocation of the 4(f)(2) exemption should be given retroactive application. The Trial Court granted Defendant's Motion for Summary Judgment, and dismissed Gonsalves' Complaint. On appeal, Gonsalves abandoned his arguments concerning retroactivity of the 1978 amendments. The Seventh Circuit Court of Appeals affirmed the District Court and held that as was the case in the fact situation presented herein, Section 4(f)(2) permitted an involuntary early retirement initiated solely at the employer's option, so long as the Plan itself provided the employer with this right, and the Plan was bonafide.

REASONS FOR DENYING WRIT

There is no important question of Federal Law concerning the application of 29 U.S.C. Section 623(f)(2) as originally enacted which need be addressed by the United States Supreme Court.

The issue faced by the Courts below herein was very narrow. It pertained solely to the interpretation to be applied to Section 4(f)(2) of ADEA as originally enacted. Because Section 4(f)(2) was repealed and not supplanted by the 1978 amendments to ADEA, only cases of involuntary retirement arising prior to 1978 could be affected by any decision rendered herein. In view of the fact that ADEA contains specific time limits governing the times during which ADEA actions and conditions precedent thereto must be invoked, the number of pending cases similar to the instant dispute is very limited. The precedential value of a decision dealing with a statutory provision which has not been in existence for some three years is virtually non-existent. No important federal policy program or procedure would be served in review of a statutory provision which no longer exists.

Most importantly, however, the fact is that the precise issue decided by the District Court and the Court of Appeals herein, has been before other Courts of Appeals. In each case the Courts in the Third, Fifth and Ninth Circuits have expressly ruled that insofar as Section 4(f)(2) is concerned, no difference exists between Plans which require retirement and those in which an employer may decide who among its employees, if anyone, it will involuntarily retire. Thus, Caterpillar's actions herein would meet the approval in panels deciding: *Jensen v. Gulf Oil Refining Co.*, 623 F.2d 406 (5th Cir., 1980); *Minton v. Whirlpool Corp.*, 569 F.2d 1012 (7th Cir., 1978); *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763 (9th Cir., 1978) and *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir., 1977). No Circuit Court of Appeals has rendered a decision in conflict with the principles set forth herein and there is no conflict between the Circuits as to the interpretation of the 4(f)(2) provision under such circumstances.

A Writ of Certiorari would be inappropriate in these circumstances.

CONCLUSION

Wherefore, for all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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